

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

3636 16th Street N.W. #B-366
Washington, D.C. 20010
www.mmtconline.org

David Honig, Executive Director
Tel: 202-332-7005; Fax: 202-332-7511
dhonig@crosslink.net

May 9, 2002

Hon. Michael Powell
Chairman
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Dear Chairman Powell:

RE: Broadcast Ownership Omnibus Proceeding, MB Docket 02-277

As the Commission completes this historic proceeding, I write on behalf of seventeen national organizations (the "Diversity and Competition Supporters" identified in the Annex to our Comments; collectively, "MMTC") to suggest how the Commission might address our proposals in the event it is unable to rule on each of them in its forthcoming Report and Order.

We have submitted a variety of proposals aimed at lifting market entry barriers facing socially and economically disadvantaged businesses ("SDBs"), 47 U.S.C. §257, and at promoting nondiscrimination and equal opportunity with respect to race and gender, 47 U.S.C. §151. See NPRM, 17 FCC Rcd 18503, 18521 ¶50 and ns. 122-123 (2002). Among MMTC's proposals are (1) a "staged implementation plan", aimed at cushioning asserted ill effects of consolidation on small businesses by phasing in deregulatory steps gradually, subject to periodic Commission measurements of the state of diversity, competition, localism and minority ownership (MMTC Comments, pp. 82-101, MMTC Reply Comments, pp. 25-32, MMTC Letter to Chairman Powell, April 28, 2003 ("MMTC Letter"), pp. 4-6); (2) ownership or attribution rule waivers for companies selling stations to SDBs, establishing incubator programs for SDBs, establishing share-time operations with SDBs or financing an SDB's construction of an unbuilt station (MMTC Comments, pp. 103-107 and 109-110); (3) grandfathering the nonattributable nature of "equity-debt-plus" (EDP) interests in SDBs (MMTC Comments, pp. 110-112); (4) allowing holders of expiring construction permits to sell the permits to SDBs (id., pp. 112-115); (5) adopting a "zero tolerance policy" for ownership rule abuse (MMTC Comments, pp. 123-127), and (6) ultimately replacing voice-based regulation with a system of tradeable "diversity credits" that would use market

forces to incentivize diversity-promoting transactions (MMTC Reply Comments, pp. 34-38; MMTC Letter, pp. 8-10). If it is not possible to address these proposals in this Report and Order, the Commission could nonetheless recognize that they have merit and are worthy of further review. In particular, the Commission could ask the Advisory Committee it plans to create to examine these proposals and make appropriate recommendations for the possible inclusion of some of them in the forthcoming fourth biennial review or in separate notices of inquiry or rulemaking.

As a means of stimulating opportunities for new entrants, MMTC has also asked the Commission to conduct an engineering review of the FM spectrum, create two new classes of FM stations and approve new FM allotments. MMTC Comments, pp. 128-141; MMTC Letter, pp. 10-11. The Commission has traditionally favored steps that could expand spectrum utilization by the public while protecting incumbent operators from harmful interference; see, e.g., Low Power Television (R&O), 51 RR2d 476, 525 (1982) (Separate Statement of Chairman Fowler and Commissioner Dawson). Consequently, if the Commission is unable to address this matter in the Report and Order, we ask that it issue a notice of inquiry to address these proposals, and that it ask the Advisory Committee to examine them as well.

Further, MMTC has proposed a procedure under which the Commission would allow the owner of a combination of local stations that could not otherwise be transferred intact to sell the combination intact to an SDB. MMTC Comments, pp. 107-108. The NAB has stated that it does not oppose this proposal. NAB Reply Comments, pp. 44 n. 79. Thus, we ask that the Commission rule on this proposal as part of the Report and Order's review of transferability issues.

MMTC has also proposed a policy of equal transactional opportunity, largely modeled after the Commission's rule barring nondiscrimination in employment, 47 C.F.R. §73.2080(a) and portions of the 1968 Fair Housing Act, 42 U.S.C. §3804(a) through (d). MMTC Comments, pp. 115-120; MMTC Letter, pp. 7-19. We recognize that broadcast licensees have broad discretion to market and sell their properties only to qualified buyers and to employ strict confidentiality to the sale process; see Public Notice of Intent to Sell Broadcast Station, 43 RR2d 1 (1978). While we acknowledge that Section 310(d) of the Communications Act prevents the Commission from considering whether a specific proposed purchaser of a station is preferable to the proposed assignee or transferee, Section 310(d) does not bar the Commission from adopting measures to prevent race and gender discrimination in the transactional process that precedes the filing of an assignment or transfer application. Id. at 3 n. 3. Thus, if the Commission is not prepared to adopt immediately the "Equal Transactional Opportunity Rule" we have requested, we ask that the Report and

Order hold that it is the policy of the Commission that discrimination in broadcast transactions on the basis of race or gender is unlawful. The Commission could recognize that race and gender discrimination in broadcast transactions has imposed barriers to entry on socially and economically disadvantaged businesses; see, e.g., Ivy Planning Group, "Whose Spectrum Is It Anyway? Historical Story of Market Entry Barriers, Discrimination and Changes in Broadcast And Wireless Licensing - 1950 to Present (2000), p. 11 (finding that "[e]xclusion of minority- and women-owned businesses from the powerful network of information, deals and deal makers thereby limiting access to license purchase opportunities and the capital to fund them"). Further, the Commission could find that race and gender discrimination by broadcast licensees is morally abhorrent and that it is inconsistent with the Communications Act, 47 U.S.C. §151 and §257. Consequently, we urge that as its first priority, the Advisory Committee be charged with producing for the Commission's consideration, within three months following its initial meeting, a draft equal transactional opportunity rule. Once it receives this draft rule from the Advisory Committee, the Commission could initiate a fast-track rulemaking proceeding on this subject. See, e.g., Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices (MO&O and NPRM), 13 FCC2d 766, 773 (1968).

Finally, MMTC has asked the Commission to recommend to Congress that it adopt legislation that would provide a capital gains tax deferral to those selling stations to SDBs. MMTC Comments, pp. 102-103; MMTC Letter, p. 3 (referring to S.367, the Telecommunications Ownership Diversification Act of 2003, introduced by Senator John McCain and cosponsored by Senators George Allen, John Breaux and Mary Landrieu). We are confident that the Commission agrees that such legislation would be highly desirable as a means of providing access to capital and opportunity to all Americans qualified to be licensees of facilities in our most influential industries. Thus, we encourage the Commission to grant our proposal and, concurrently with the issuance of the Report and Order, issue a letter transmitting this recommendation to Congress.

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Throughout this proceeding, you have given extensively of your time to meet with us and consider our concerns. We are profoundly appreciative of your accessibility and open-mindedness, and we have the greatest respect for the integrity and care with which you have approached this most monumental of assignments.

Sincerely,

David Honig

David Honig
Executive Director

cc: Hon. Kathleen Abernathy
Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Kevin Martin

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